Filed 3/8/11 P. v. James CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. LANGFORD JAMES, JR., Defendant and Appellant.	2d Crim. No. B221811 (Super. Ct. No. 1308167) (Santa Barbara County)

Langford James, Jr. appeals a judgment following conviction of residential burglary, spousal battery, making criminal threats, attempted making of criminal threats, and four counts of dissuading a victim, with findings of a prior serious felony strike conviction, and service of two prior prison terms. (Pen. Code, §§ 459, 273.5, subd. (a), 422, 664, 136.1, subd. (c)(1), 667, subd. (a), 667, subds. (b)-(i), 1170.12, subds. (a)-(d), 667.5, subd. (b).)[1] We affirm.

FACTS AND PROCEDURAL HISTORY

James and his wife Tammi had been married for 14 years and had two children. Their relationship was a stormy one characterized by frequent domestic violence. At times, James struck and slapped Tammi, but soon his anger escalated to threats to kill her. Tammi described James as at "a breaking point."

[1] All further statutory references are to the Penal Code.

In October 2008, James became angry when Tammi spoke privately with her daughter Tamika. He took a kitchen cooking pot and walked through the residence striking the pot and threatening to "beat [Tammi's] head until the white meat of [her] brain showed." James also threatened to "bury" any person who summoned police assistance.

James's rage frightened Tamika as he ranted for nearly 30 minutes. In the past, she had reported James's acts of domestic violence. Eventually, Tamika and her stepsister persuaded him to leave the residence. (Counts 3, 4, & 5.)

Tammi left the residence for several nights because she feared James. When she returned home, they discussed a separation. She stated that she would provide a 30-day notice to the landlord. James agreed to separate and on November 17, 2008, he packed "everything in [his] closet" and left. Tammi found a few articles that he left behind and placed them in a suitcase.

Tammi did not inform the landlord, however, that she intended to vacate. She was the sole signatory on the lease, paid the rent, and possessed the keys to the residence.

For the next two weeks, James slept at the residence with Tammi's permission. After that period, he slept elsewhere.

In December 2008, Tammi telephoned James and requested that he bring diapers for the baby. On December 10, 2008, he appeared at the residence with ice cream, but no diapers. He left, but returned shortly. Tammi was outside when James drove into the driveway. When he noticed that Tamika's vehicle was not there, he became irate and spit on Tammi several times. He then "socked" her in the face as she tried to protect herself. Tammi ran into the residence and pushed against the door to prevent James from entering. He overcame Tammi's physical resistance, however, and entered the kitchen. There, he pushed Tammi against the wall and pulled her hair. When Tamika tried to intervene, he ceased his attack on Tammi, took Tamika's cellular telephone, and left. Tammi and Tamkika walked to the local police station and reported the incident. As a result of James's actions, Tammi suffered a bloody nose, a bruise near

her eye, and a puffy lip. The trial court admitted into evidence photographs of Tammi's injuries. (Counts 1 & 2.)

Recorded Telephone Calls During Custody

(Counts 6, 7, & 8)

During his confinement in county jail, James placed four telephone calls to "Melvin." The telephone calls were recorded and the prosecutor played the recordings at trial.

During the telephone conversations, James stated that "[s]omething need[ed] to be done to that bitch dog" and that "I need somebody to go over there and talk to that bitch." He also stated that "I'm a kill that bitch," and "she a done daughter" and that "she better come tell them people she lying." James urged Melvin to "[g]o on over there and see what she say." Melvin responded that he would do "whatever I have to do," and in a later conversation stated "ain't nobody supposed to be coming to court," and "them motherfuckers ain't gone show up." In a final conversation, Melvin stated: "[W]e ain't gone let them show up, regardless of what motherfuckers gotta do, they ain't gone show up."

Prior to the preliminary examination, a man visited Tammi's residence and stated that he had been sent to "make this go away" and advised her not to testify in court. Tammi was frightened and informed the prosecutor.

James also telephoned Tiffany Williams during his jail confinement. He stated that although he was not permitted to have contact with Tammi, he could not "control what somebody that cares about [him] goes and does." He also stated that he would be "alright" if Tammi did not testify in court and that it was important to "have somebody out there trying to . . . do stuff for [him]." Tiffany responded that she would do whatever she could to help.

Conviction and Sentencing

The jury convicted James of residential burglary, spousal battery, making criminal threats, attempted making of criminal threats, and four counts of dissuading a victim by force or threat. (§§ 459, 273.5, subd. (a), 422, 664, 136.1, subd. (c)(1).)

Following his waiver of a jury trial, the trial court found that James suffered a prior serious felony strike conviction and served two prior prison terms. (§§ 667, subd. (a), 667, subds. (b)-(i), 1170.12, subds. (a)-(d), 667.5, subd. (b).)

The trial court sentenced James to a prison term of 38 years four months, consisting of doubled second strike sentencing and consecutive terms. It imposed but stayed sentence on spousal battery (count 2), dissuading a witness (count 4) and attempted making of criminal threats (count 7), pursuant to section 654. The court imposed a $10,000 restitution fine and a $10,000 parole revocation restitution fine, ordered victim restitution, and awarded James 442 days of presentence custody credit. (§§ 1202.4, subd. (b), 1202.45.)

James appeals and contends that: 1) insufficient evidence supports his conviction of burglary (count 1); 2) the trial court erred by not defining "moved out," a phrase added to the standard burglary instruction; 3) insufficient evidence supports his conviction of burglary with an intent to commit theft; 4) the trial court erred by not instructing regarding attempt (counts 4, 5, 6, & 8); 5) insufficient evidence supports his conviction of the attempted making of criminal threats (count 5); 6) insufficient evidence supports his conviction of attempting to dissuade a victim or witness by force or fear; 7) the trial court erred by not questioning jurors post-trial regarding fears of his family. He asserts that the errors also violate federal guarantees of due process of law.

DISCUSSION

I.

James argues that there is insufficient evidence that he lost the unconditional possessory right to enter the family residence. He correctly points out that a person cannot burglarize his own home. (*People v. Gauze* (1975) 15 Cal.3d 709, 714.) James relies upon evidence that he slept in the residence for several weeks following his moving out, that Tammi hoped to reconcile with him, and that she did not order him to leave the residence.

In reviewing the sufficiency of evidence to support a conviction, we examine the entire record and draw all reasonable inferences therefrom in favor of the

judgment to determine whether there is reasonable and credible evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Solomon* (2010) 49 Cal.4th 792, 811.) Our review is the same in prosecutions primarily resting upon circumstantial evidence. (*Ibid.*) We do not redetermine the weight of the evidence or the credibility of witnesses. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129.)

Sufficient evidence supports the finding that James no longer had an unconditional possessory right to enter the family residence. He was not a signatory on the lease, did not pay the rent after November 17, 2008, and had no keys to the residence. He moved out of the family home on November 17, 2008, leaving behind a few stray belongings. Tammi placed those belongings in a suitcase for him. On December 10, 2008, Tammi did not know where James resided or where he slept. Although she inquired of him, he did not answer her question. The jury weighed the evidence and drew the reasonable inference that James lost his unconditional possessory right to enter the residence. We do not reweigh the evidence or redetermine witness credibility. (*People v. Guerra*, *supra*, 37 Cal.4th 1067, 1129.)

II.

James contends that the trial court erred by not instructing regarding the phrase "moved out," which the court added to CALCRIM No. 1700, the standard burglary instruction. He argues that the phrase means more than a temporarily leaving, and requires surrender of an unconditional possessory interest in property. James adds that the ambiguous instruction was prejudicial beyond a reasonable doubt.

The trial court instructed with CALCRIM No. 1700, as modified: "To sustain a burglary conviction, the People must prove that the defendant does not have an unconditional possessory right to enter his family home. A family member who has moved out of the family home commits burglary if he or she makes an unauthorized entry with a felonious intent, since he or she had no claim of a right to enter that residence. [¶] An unconditional possessory right to enter is the right to enter as the occupant of that structure."

Here the instruction properly and clearly instructed that the prosecutor must prove that James did not have an unconditional possessory right to enter the family home. The instruction further defined "unconditional possessory right." We presume that jurors are intelligent persons capable of understanding the jury instructions and applying them to the evidence. (*People v. Carey* (2007) 41 Cal.4th 109, 130.) There is no reasonable likelihood that jurors understood "moved out" to mean a temporary leaving by a person who retained unconditional possessory rights to the residence.

III.

James argues that there is insufficient evidence that he entered Tammi's residence with the specific intent to steal Tamika's cellular telephone. (Count 1.) He asserts that instruction on this invalid legal theory requires reversal of the burglary conviction.

The trial court instructed that the jury could convict James of burglary if it concluded that at the time he entered Tammi's residence, he intended to commit theft or to commit spousal battery. Even if James did not possess the intent to commit theft of the telephone at the time he entered the residence, that theory was merely factually inadequate. Instruction on a factually inadequate theory does not require reversal of a conviction if at least one valid factual theory remains. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129.) Here sufficient evidence exists that James entered the residence in order to continue his battery upon Tammi. (*Id.* at p. 1129 [jury fully equipped to detect factually inadequate theory].)

IV.

James argues that the crime of intimidating a victim or witness, section 136.1, subdivision (c)(1), requires instruction regarding the law of attempt. (Counts 4, 5, 6, & 8.) He asserts that the crime requires a direct step in its commission, rather than mere preparation, in order to distinguish the crime from an emotional outburst. James contends the error is prejudicial because of insufficient evidence that he attempted force or fear in trying to intimidate Tammi and his stepdaughter from complaining or cooperating with law enforcement.

Section 136.1, subdivision (b) provides: "Except as provided in subdivision (c), every person who attempts to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from doing any of the following is guilty of a public offense . . . . [¶] (1) Making any report of that victimization to any peace officer . . . . [¶] (2) Causing a complaint, indictment, information . . . to be sought and prosecuted, and assisting in the prosecution thereof. [¶] (3) Arresting or causing or seeking the arrest of any person in connection with that victimization."

The trial court instructed with CALCRIM No. 2622, defining the crime of intimidating a witness, and CALCRIM No. 2623, defining additional allegations that James acted maliciously and used or threatened to use force pursuant to section 136.1, subdivision (c). CALCRIM No. 2622 instructed that in order to convict James, the People must prove that "[t]he defendant maliciously tried to prevent or discourage [Tammi and her daughter] from attending or giving testimony at a judicial proceeding or . . . from making a report that someone was the victim of a crime to law enforcement." The court also instructed that violation of section 136.1, subdivision (c) required a finding that James acted with specific intent. A slight act performed in furtherance of a design to commit a crime will constitute an attempt. (*People v. Memro* (1985) 38 Cal.3d 658, 698, overruled on other grounds by *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2; *People v. Foster* (2007) 155 Cal.App.4th 331, 336.) The instructions sufficiently conveyed this legal principle. The court properly instructed concerning the crime of intimidating a witness and additional instruction was not required.

V.

James contends that insufficient evidence supports the immediacy element of attempted criminal threats, count 7. He asserts that the threats made during his telephone conversation with Melvin were emotional outbursts that he did not intend to be communicated to Tammi. (*People v. Felix* (2001) 92 Cal.App.4th 905, 913-914 [insufficient evidence of attempted criminal threat where defendant did not intend his psychologist to communicate threat to victim].)

Section 422 punishes a criminal threat that is "so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution . . . ." A defendant commits an attempted criminal threat when, acting with specific intent, he "performs an act that goes beyond mere preparation and indicates that he . . . is putting a plan into action." (*People v. Toledo* (2001) 26 Cal.4th 221, 230.) Thus, for example, an attempted criminal threat is committed where the threat is intercepted before delivery to the victim. (*Id.* at p. 231.)

There is sufficient evidence that James's threat was unconditional, immediate, and specific. On the day of his arrest, he spoke with Melvin and stated: "I'm telling you dog. I'm a kill that bitch. . . . [¶] . . . [G]o tell her that. You go tell her that. Tell her . . . go tell her. Whenever I get out, wherever she at . . . whatever she doing, she's a done daughter." Although Melvin may not have delivered James's threats, James nonetheless committed the crime of attempted making of criminal threats. (*People v. Toledo*, *supra*, 26 Cal.4th 221, 231.)

VI.

James contends that there is insufficient evidence that on December 29, 2008, he attempted to dissuade a victim or witness by force or fear (count 8).

Sufficient evidence supports James's conviction of witness dissuasion through express of implied threats of force or violence. (§ 136.1, subd. (c)(1).) In the December 29, 2008 conversation with Melvin, James sought reassurance that Tammi would not testify against him. Melvin responded that "we ain't gone let them show up." James responded: "I hear you," but said nothing to suggest that he intended only non-violent means of persuasion. During his prior telephone conversations with Melvin, James discussed that Tammi "better come tell them . . . she lying" and that he would "kill that bitch." When viewed in the context of James's prior conversations with Melvin, the jury could reasonably conclude that James's December 29 statements constituted implied threats of force or fear.

VII.

James argues that the trial court erred by not questioning the jury whether its deliberations were affected by fears of his family. He points out that the jury sent a note with its verdict stating: "The defendant's family are near Jurors cars. Some Jurors have fears to leave the court. Please discuss with Jurors security when leaving court." James relies on *People v. Collins* (1976) 17 Cal.3d 687, 691-693, holding that the trial court may dismiss a juror who is too emotionally involved to follow instructions. He adds that section 1044 empowers the trial court to control its proceedings in the interests of justice. (*Ibid.* ["It shall be the duty of the judge to control all proceedings during the trial . . . with a view to the expeditious and effective ascertainment of the truth regarding the matters involved"].)

The trial court did not err because the jury note does not suggest that the verdicts were influenced by threats or extraneous matters. (*People v. Cleveland* (2001) 25 Cal.4th 466, 478 [trial court possesses broad discretion regarding investigation of juror bias or misconduct].) The note, fairly read, reflects that jurors were concerned regarding post-verdict encounters with defendant's family members in the parking lot. It does not indicate concern with matters occurring during trial or deliberations that affected the jury's obligation to apply the instructions and consider only the evidence admitted at trial. The court acted within its discretion by not inquiring regarding jurors' fears. (*Ibid.*)

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

James F. Iwasko, Judge

Superior Court County of Santa Barbara

Wayne C. Tobin, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, Margaret E. Maxwell, Deputy Attorney General, for Plaintiff and Respondent.